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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

CHRIST ORFANOS, as Administrator of the Estate of James Orfanos, Deceased,
Petitioner and Appellee Below,

vs.

GEORGE ZOLINTAKIS, Executor of the Will of Peter Zolintakis, deceased, and substituted herein in lieu of said Peter Zolintakis,
Respondent and Appellant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, to wit, the above named Christ Orfanos, as administrator of the estate of James Orfanos, deceased, complains of the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, made and entered in that court on March 31, 1941 (R. 125-6), and respectfully petitions for a writ of certiorari to review the same as against respon-

dent above named. Said petition is based upon the grounds hereinafter set forth.

SUMMARY STATEMENT OF MATTER INVOLVED

Although this litigation is commonplace and the amount involved is much less than that usually at stake in matters engaging the attention of this Court, it is contended that the decision here sought to be reviewed presents questions relating to the right of trial by jury, the effect of final judgments and the accepted rules of procedure in Federal courts which are unusual and of grave importance.

Petitioner and respondent make conflicting claims to the proceeds of a policy of insurance issued by The Equitable Life Assurance Society of the United States on the life of the above named James Orfanos. Petitioner contends that respondent's testator to wit, the above named Peter Zolintakis, received possession of said policy and was named beneficiary therein solely for the purpose of affording him collateral security for the repayment of money loaned by him to the insured and that respondent is entitled to no greater portion of the proceeds thereof than was awarded to him by the District Court, to wit, sufficient thereof to pay said indebtedness with accrued interest and collection costs. Respondent contends that he is entitled to all of said proceeds. These proceeds, amounting to $19,016.10 with accrued interest, have been paid into court (R. 108) and said Society has no further interest in this litigation.

On December 12, 1935, following the death of said insured, the said Peter Zolintakis commenced suit against said Society to recover, as beneficiary, the full amount payable under said policy. Pursuant to direction of the United States District Court for the District of Utah, in which the suit was pending, a verdict was rendered in favor of defendant Society on January 14, 1937 (R. 3). Judgment on said verdict was reversed by the United States Circuit Court of Appeals for the Tenth Circuit, and, following remand from that court, your petitioner asked and was granted leave to intervene in the suit (R. 4-5).

A note to the opinion here sought to be reviewed recites (R. 115): "During pendency of this suit Christ Orfanos died

and his administrator was substituted in this suit." Your petitioner is Christ Orfanos and he is the only administrator of the estate of his deceased brother, the insured, who has ever been appointed.

In his complaint in intervention petitioner set forth his appointment and qualification as administrator of the estate of said insured, alleged the issuance of the policy, payment of premiums, death from a blow on the head and proof of death of insured and right to double indemnity ($15,000.00). He also alleged that said Peter Zolintakis was given possession of said policy and named beneficiary therein for the sole purpose of affording said Peter Zolintakis collateral security for the repayment of money loaned by him to the insured. He further alleged the legal conclusion that said Peter Zolintakis became a trustee for the use and benefit of petitioner of any proceeds recovered from defendant Society by said Peter Zolintakis, prayed that such trusteeship be declared, and also prayed for judgment in his (petitioner's) favor and against defendant Society for said $15,000.00, with accrued interest, less the amount of money advanced by Peter Zolintakis to the insured (R. 4-7).

After a motion by Peter Zolintakis to dismiss said complaint in intervention for alleged failure to state a cause of action had been denied, he filed his answer thereto, admitting that he had advanced certain sums to the insured, but denying that said advances were loans or that he was made beneficiary in or received the policy to afford him collateral security for the repayment of money advanced, and alleging that he was the owner of said policy and entitled to all of the proceeds thereof. He also pleaded that petitioner was estopped by reason of alleged laches and delay in asserting an interest in the policy or its proceeds. (R. 7-10.)

Thereafter, on November 16, 1938, the second trial of said suit began before a jury (R. 23), same being the only trial to a jury in which petitioner participated.

The Evidence

None of the voluminous evidence relative to alleged false representations in the procurement of the policy and other matters bearing on the liability of defendant Society are pertinent here. The evidence touching the nature of the transac-

tion between the insured and Peter Zolintakis is brief. A statement of that evidence is essential to an understanding of the questions herein presented and the reasons relied on for the allowance of said writ.

On said second trial testimony given under oath by Peter Zolintakis before petitioner became a party, to wit, on said *first* trial, was received in evidence. On said *first* trial Peter Zolintakis, speaking of loans made by him to the insured prior to any transaction here involved, said in substance (R. 33): I had loaned money to the insured; "I don't remember exactly when it was but one time I give him $30.00; next time give him $50.00"; the insured paid this money back. Coming to the transactions here involved he testified on said *first* trial in substance as follows (R. 34-5): The insured came to me because he needed money to pay for his insurance; I loaned him the money, giving him $137.10 at that time; I gave him the money for that purpose "and make me the beneficiary"; he told me that if I was afraid he would give me the policy; on a second occasion I gave the insured the money to pay for another premium; "I gave it to him direct for the policy as a loan"; "He didn't tell me when he would pay me back, but he told me as long as I turn the policy over to you why are you scared of the money?"; I told the insured that "if he give me the money I would give him the policy".

The foregoing testimony was in no manner changed or qualified on said *first* trial.

In the opinion of the Circuit Court of Appeals for the Tenth Circuit, examination of which is here sought, that court says (R. 118) that "the manner and purpose of the designation of the appellant as beneficiary, are debatable". Without conceding that "debatable" questions of fact may be withdrawn from a jury and finally determined by an appellate court in a law case, as was done by the Circuit Court of Appeals in this case, or that testimony given on a second trial qualifying or contradicting that given on an earlier trial may, as matter of law, be declared controlling, petitioner will now refer to the testimony of Peter Zolintakis, his son and son-in-law, given upon the *second* trial, which apparently induced said conclusion of the Circuit Court of Appeals that "the manner and purpose of the designation of the appellant as beneficiary, are debatable".

In its opinion (R. 118) the Circuit Court of Appeals refers to testimony of the interpreter (a son of Peter Zolintakis) that when interpreting for his father he made "no fine distinction" in the use of the word "loan." This testimony was given on the *second* trial. The occasion when the son thus acted as interpreter was when he went with his father to the office of defendant Society (R. 36). On that occasion Peter Zolintakis said that the insured asked him "to loan him the money to pay the insurance." On that occasion Peter Zolintakis admittedly said: "Jim (the insured, James Orfanos) gave me the policy in case anything happened to him, because Jim thought if he got enough money he would pay me and get the policy back." Said son testified that he had no trouble in translating the last quoted statement (R. 36).

In said opinion the testimony of Peter Zolintakis that he gave the insured the money "to help him out" is stressed (R. 118). This testimony was given on the *second* trial (R. 46). On said *second* trial Peter Zolintakis also testified (R. 47-48) that he didn't understand the word "loan," although immediately thereafter (R. 48), when asked if he knew that when money is loaned it is to be paid back, he said "Yes, but I didn't intend this to be a loan." Attention is here directed to the testimony of this witness on the *first* trial above summarized, when he testified to loans made by him on former occasions which had been repaid by the insured. Attention is also directed to the testimony of this witness on said *second* trial (R. 44 and again on R. 45) where he answered, in response to questions propounded by his own attorney, that when he advanced the money to the insured he said to the insured that he would "give the policy back" if the insured gave him "the money back." A little later he said (R. 45-6) that there was no talk about whether or not he would give the policy back.

In said opinion (R. 117), after referring to testimony given by the son-in-law of Zolintakis on the *second* trial (R.28-9) that the insured had first tried to borrow the money from his brother, then from the son-in-law, and finally approached Peter Zolintakis, the Circuit Court of Appeals says (R. 118): "It is fairly conclusive that the insured contemplated lapsing the policy." If this observation were supported by evidence, it might have some bearing on the intention of the insured when he named Peter Zolintakis as

beneficiary. However, it is respectfully contended that there is no such evidence. On the contrary the above testimony of the son-in-law as to the diligent efforts of the insured to borrow money for premiums from his brother, then from him (the son-in-law) and finally from Peter Zolintakis, both before and when the next premium fell due following the naming of the latter as beneficiary, would seem to be strong evidence of the insured's intention to continue the policy in force and retain a pecuniary interest therein.

In said opinion (R. 118) the court says that Peter Zolintakis learned from his son-in-law that "he would be entitled to the proceeds of the policy in event of insured's death. After this understanding was verified by the insured he advanced the money and the premiums were paid." Not only was this testimony first given on the *second* trial, but it was expressly held by the District Court (R. 29) that the alleged conversation between Zolintakis and his son-in-law was not binding on petitioner. It is submitted same was clearly heresay.

In said opinion the court says (R. 119) that "in substance" the insured said to Peter Zolintakis: "Why should you worry, if I die you get the money." Apparently the testimony thus interpreted by the court is that given by Peter Zolintakis on the first trial in speaking of the insured's effort to borrow money: "He didn't tell me when he would pay me back, but he told me as long as I turn the policy over to you why are you scared of the money?" It is submitted that this testimony, instead of negativing a loan and a pledge, clearly indicates such a transaction.

In said opinion the following observation appears (R. 118): "Obviously, it was the purpose of counsel for the administrator (petitioner) to use the word 'loan' in its technical sense." The meaning of said word in its non-technical sense is not indicated. In this connection reference is made to the fact that petitioner was not a party to this suit and no attorney appeared for him on said *first* trial when he gave the testimony first above summarized.

Findings of Jury

After conclusion of the evidence on said second trial, the District Court submitted special interrogatories to the jury,

which found (R. 59-61) that it was the understanding and intention of the parties that the money advanced by Peter Zolintakis to the insured would be repaid and that the policy would be held by Zolintakis only until such time as the money was repaid.

None of the findings of the jury has ever been set aside, nor has any motion to vacate same ever been made by respondent.

The Second Appeal

At the close of said second trial the District Court denied the respective motions of your petitioner and Peter Zolintakis for a directed verdict, dismissed their respective complaints, and entered judgment in favor of defendant Society (R. 11-12). On April 11, 1939, both petitioner and Peter Zolintakis appealed from said judgment (R. 12). Pending appeal Peter Zolintakis died and respondent was substituted for him.

When the time arrived for designating the Points relied upon for a reversal, petitioner and respondent joined in that designation. It is unnecessary to refer to any of the numerous Points directed to the matter of liability of defendant Society. We shall here call attention to three basic Points jointly relied upon by appellants (petitioner and respondent) on said second appeal, to wit:

> "(a) Appellants motions for a directed verdict against the insurance company, appellee, were well taken and should have been granted and such verdict directed.
>
> "(b) The motion for judgment in favor of Appellants and against Appellee herein upon the answers to the interrogatories returned by the jury should have been granted and judgment here entered against the Defendant and Appellee herein." (R. 130-131)
>
> (c) . . . . The action of the District Court in dismissing the complaints of appellants "is hereby appealed from by both and this designation of points relied upon is made and relied upon by both said appellants." (R. 135).

The judgment (R. 135-6) and the mandate (R. 13-14) of the Circuit Court of Appeals on said second appeal were

exactly what petitioner and respondent jointly demanded. In said judgment, dated January 3, 1940, it was ordered and adjudged "that the judgment of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to enter judgment for" petitioner and respondent and that they have their costs. After reciting the judgment, said mandate, dated May 31, 1940, commanded "that such further proceedings be had in said cause, in conformity with the opinion and judgment of this court as according to right and justice, and the laws of the United States, ought to be had."

Petition for certiorari to review said judgment was denied on May 27, 1940: *The Equitable Life Assurance Society of the United States, petitioner,* v. *George Zolintakis and Christ Orfanos, as Administrator, etc.,* No. 922, 310 U. S. 640; 60 S. Ct. 1087.

District Court Proceedings Following Mandate

Said mandate was filed in said District Court on June 14, 1940 (R. 14).

On June 14, 1940, pursuant to notice, petitioner presented a form of judgment and moved that same be entered, awarding respondent the aggregate of the principal sums advanced to the insured by Peter Zolintakis, with accrued interest and costs of suit, and awarding to petitioner the remaining balance of said proceeds from the policy (R. 14-16). Respondent objected to the entry of such judgment and made a motion for the entry of a judgment for the entire proceeds of the policy in his favor, or in the event that such judgment was not entered, that any judgment in favor of petitioner be "conditioned upon the payment from said judgment to the plaintiff (respondent) herein of all costs and expenses necessarily incurred in the trials and appeals of the principal action herein against the defendant insurance company, and also the attorneys' fees of plaintiff as paid or contracted," etc. (R. 16-20). The statement in said objection and motion (R. 16) that the District Court reserved issues between petitioner and respondent, is without support in the record. In said objection and motion (R. 16) respondent moved the

District Court "for an order authorizing the Clerk of this Court to return the said mandate to the Circuit Court of Appeals for correction so as to clearly confine the same to the sole issue presented to the said Circuit Court of Appeals for determination and which was limited to the matter of judgment against the defendant insurance company," etc. It would seem that said District Court could not and it did not enter such an order. No motion or other application was ever made to said Circuit Court of Appeals for the recall or modification of its mandate.

On July 27, 1940, respondent filed a so-called "ancillary petition" in said District Court. In it he alleged certain agreements between him and his attorneys whereby an aggregate of one-half of all sums recovered by him should be paid to them. He set forth alleged services rendered by said attorneys and expenditures other than taxable costs that had been made in prosecuting the suit, and prayed that said fees of attorneys and expenditures be ordered paid from the proceeds of the policy of insurance (R. 82-5).

Without prejudice to respondent's right to contest petitioner's claim to any part of the proceeds of the policy the parties entered into a stipulation (R. 88-101) relative to the nature and extent of services rendered by respondent's attorneys and expenditures other than taxable costs made in the prosecution of the suit and agreed (R. 101) that the matter involved in said ancillary petition should be submitted to the District Court upon said stipulation "and the Court's knowledge relative to the nature, extent and value of professional services rendered by the attorneys for plaintiff throughout the progress of this suit."

Upon the filing of said stipulation, to wit, on July 27, 1940, the District Court made and signed findings of fact (R. 102-5), conclusions of law (R. 105-6) and judgment (R. 106-7). It would seem at least doubtful whether any findings by that court relative to the nature of the transaction between Peter Zolintakis and the insured were either necessary or proper. No evidence of any character has been introduced on that subject since the second trial. However, the District Court adopted the findings of the jury (R. 101), found that the advances made to the insured by Peter Zolintakis were loans, and that Peter Zolintakis was named beneficiary in said policy and

held same solely for the purpose of affording him collateral security for the repayment of said loans (R. 103).

By said judgment entered in the District Court, respondent was awarded the aggregate amount of said loans with accrued interest, to wit, $407.61, and collection costs as follows: expenditures other than taxable costs made by him and his attorneys aggregating $659.33 and the sum of $4589.20 for the use and benefit of his attorneys. The balance of said proceeds remaining after said indebtedness, expenditures and attorneys' fees had been paid was by said judgment awarded to petitioner. Respondent's costs of suit, later taxed in the sum of $1250.00, have been paid by defendant Society (R. 108).

Judgment Sought to Be Reviewed

From said last mentioned judgment of the District Court respondent appealed (R.109). The pertinent Points by him relied upon for a reversal which were held valid by the Circuit Court of Appeals are: 1. That said judgment "is contrary to and against law"; 5. that "the jury findings do not support the judgment"; 6. that "the jury findings were not supported by the evidence"; 7. that "the findings of the Court do not support the judgment"; and 8. that "the findings of the Court are not supported by the evidence". (R. 1-2.)

Pursuant to the opinion of said Circuit Court of Appeals rendered on March 31, 1941 (R. 115-125), the judgment herein sought to be reviewed was made and entered on March 31, 1941 (R. 125-126). By that judgment it is ordered and adjudged "that the judgment of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded with directions to enter judgment for George Zolintakis, Executor of the will of Peter Zolintakis, deceased, and substituted herein in lieu of said Peter Zolintakis; and that George Zolintakis, executor of the will of Peter Zolintakis, deceased, and substituted herein in lieu of said Peter Zolintakis, appellant, have and recover of and from Christ Orfanos, as administrator of the estate of James Orfanos, deceased, appellee, his costs herein, and have execution therefor."

JURISDICTION OF THIS COURT

This application for a writ of certiorari is made under Section 240 of the Judicial Code (U. S. C., Title 28, Sec. 347), as amended by the Act of February 13, 1925, Subdivision (a). It is contended that this Court has jurisdiction to review and should review said decision and judgment as herein prayed for because: (1) Said decision is in conflict with the decisions hereinafter cited, of this Court and of other Circuit Courts of Appeals on the same matter; and (2) said judgment decides a Federal question in a way probably in conflict with applicable decisions of this Court hereinafter cited; and (3) in rendering its said judgment and decision herein said United States Circuit Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

THE QUESTIONS PRESENTED

By this petition the following questions are presented:

1. Did said Circuit Court of Appeals have power to enter judgment for respondent and to reverse the judgment of the District Court without remanding for new trial?

2. Was there sufficient evidence to sustain said findings of fact and judgment?

3. Was the judgment on said second appeal in effect a "consent" judgment as between petitioner and respondent?

4. Was the judgment rendered in favor of petitioner on said second appeal *res judicata* as to matters therein adjudicated or subject to review on a later appeal?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

In stating the reasons relied on for allowance of a writ of certiorari, petitioner will direct attention to the four questions presented in the order in which they are stated in the next preceding title.

Court Erred in Reversing without Remand for New Trial

This is a suit at common law, where the value in controversy exceeds $20.00 and is $19,016.10. The mere fact that in

his complaint in intervention petitioner expressed the legal conclusion that Peter Zolintakis became a trustee of the policy and of any proceeds therefrom that might come into his hands and in his prayer asked that such status be declared, did not transform the action into an equity suit. The trust created was the same kind of resulting trust that arises in any case of pledge or bailment. In said prayer petitioner demanded a money judgment against defendant Society. The cause was tried to a jury. On appeal, as hereinbefore indicated, respondent joined with petitioner in assigning error on the part of the District Court in refusing to direct a verdict for petitioner and in insisting that "upon the answers to the interrogatories returned by the jury" judgment should have been entered for petitioner as well as for respondent in the District Court and that judgment should be "here entered" against defendant Society. Even where a formal, express trust has been created, the beneficiary may and should sue the trustee at law when such trustee repudiates or otherwise breaches the trust and full relief may be given by a money judgment or other adequate remedy at law.

1 Pomeroy's Equity Jurisprudence (4th Ed.) Secs. 175-9.

Pursuant to the Seventh Amendment to the Federal Constitution, in suits of this nature, "the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Respondent did not move to vacate any of said findings of the jury "within 10 days" after they were returned or at any time. Therefore it is contended that subdivision (b) of Rule 50 of the Rules of Civil Procedure did not empower the Circuit Court of Appeals to nullify said findings, substitute its conclusion as to the facts for that of the jury and order judgment for respondent instead of remanding for new trial. In this situation it is contended that decisions of this court like *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, at 376 et seq.; 33 S. Ct. 523, are still controlling and in conflict with the judgment here sought to be reviewed.

In *Berry* v. *United States*, ... U. S. ..... (No. 336, October Term 1940. Not yet officially reported); 61 S. Ct. 637, the

question last above discussed is deemed "important" but a ruling thereon was not necessary to the decision.

Even had respondent made a motion to vacate said findings as contemplated in said Rule 50, or should it be held that without any motion in the District Court questioning the sufficiency of the evidence to sustain such findings an appellate court has power to reject them and on its own findings enter judgment without remand for new trial, it is contended that such power could only be exercised on the appeal from the judgment entered by the District Court on said second trial. It is contended: that any claimed power of the Circuit Court of Appeals to substitute its judgment for that of the jury as to the nature of the transaction between Peter Zolintakis and the insured must at some time come to an end; that when petitioner and respondent jointly contended on said second appeal that the District Court erred in dismissing their respective complaints and that "upon the answers to the interrogatories returned by the jury" judgment should have been granted and judgment should be "here entered" in their favor and against defendant Society, any and every right of respondent to have vacated any of said findings as to the nature of the transaction between Peter Zolintakis and the insured terminated and the appellate court lost any power it might otherwise have possessed under Rule 50 to reject said findings relating to said transaction; that such power could not be revived or exercised on the last (third) appeal.

Evidence Was Sufficient to Sustain Findings and Judgment

As in *Berry* v. *United States*, supra, it will probably be unnecessary for this Court to construe subdivision (b) of Rule 50 of the Rules of Civil Procedure. This is true because, as petitioner confidently contends, the evidence is not only sufficient to sustain the finding that the advances made by Peter Zolintakis to the insured were loans, to secure repayment of which he received the policy and was named beneficiary therein, but well-nigh if not entirely excludes any other conclusion.

There was no blood relationship between the insured and Peter Zolintakis (R. 39). The insured was survived by three sisters and one brother besides petitioner (R. 100). In

said opinion (R. 119) it it noted that "widows and orphans" are not involved. It is not contended that the blood relationship to the insured of those who will share in any judgment recovered by petitioner is a sufficient reason for rendering such a judgment. However, it is submitted that the heirs of Peter Zolintakis have no more right than a casual traveler on the highway to any greater part of the proceeds of the policy that is given to them by the judgment of the District Court.

When Peter Zolintakis was named beneficiary, he was more than 20 years older than the insured (R. 6; 8; 30). Even in the absence of the testimony as to the nature of the transaction between them, it would seem extraordinary that a man of the age of the insured, whose health was sufficiently robust to obtain insurance on his life, would select as beneficiary one who, in the usual course, would die long before any payment under the policy might reasonably be anticipated. In this connection the observations of the District Court are pertinent (R. 64-6).

It is submitted that the diligent efforts of the insured to borrow money to meet premiums do not indicate that he was in search of a beneficiary; manifestly he was in search of some person who would lend him the required money. Neither he nor Peter Zolintakis was a lawyer or capable of expressing their contract in technical legal language. When the insured asked, while persuading Zolintakis to lend him money (R. 35): "As long as I turn the policy over to you why are you scared of the money?" and when Zolintakis then and there said to the insured that he would "give the policy back" if the insured gave him "the money back," as was reiterated at least twice by Zolintakis even on said *second* trial (R. 44-5) the transaction, as petitioner contends, was unmistakably branded as one whereby Zolintakis received the policy and was named beneficiary therein for the sole purpose of affording him collateral security for the repayment of the money loaned.

Even if it be assumed that the unqualified testimony of Zolintakis on the *first* trial was in some manner weakened by his testimony and that of his son and son-in-law on the *second* trial and that, as stated in said opinion, "the manner and purpose of the designation of the appellant as beneficiary, are debatable," it is submitted that the Judge and jury who saw these

witnesses as they testified on the second trial, and were able to note their demeanor, had better opportunity than the Circuit Court of Appeals to weigh their testimony and compare it with that given by Peter Zolintakis on the *first* trial. It is submitted that the weight to be given to conflicting evidence is for the jury to determine.

Berry v. *United States*, .. U. S. .. (No. 336, October Term, 1940) 61 S. Ct. 637;
Jose Rivera Soler & Co., Inc. v. *United Firemen's Ins. Co.*, 299 U. S. 45, at 50, 57 S. Ct. 54;
Phoenix Ins. Co. v. *Doster*, 106 U. S. 30, at 32, 1 S. Ct. 18;
Shadoan v. *Cincinnati, N. O. & T. P. Ry. Co.*, 220 Fed. 68 at 71; 73 (6th C. C. A.).

Amick v. *Butler, Adm'r.*, 111 Ind. 578; 12 N. E. 518, is cited in said opinion (R. 121). In that case a policy of insurance on the life of a debtor was taken out pursuant to contract between him and the creditor, the creditor being named beneficiary. From the beginning the policy belonged to the creditor, with a contract right in the debtor to acquire title. In the case at bar the original beneficiary was the brother of the insured (R. 24). In the *Amick* case the creditor unconditionally bound himself to pay and did pay all premiums as they fell due, including the initial premium, with no obligation whatsoever on the part of the insured to reimburse him. In the case at bar Peter Zolintakis neither assumed nor discharged any such obligations and the insured always remained liable for the money he borrowed to meet premiums. It is doubtful if other courts would construe the transaction involved in the *Amick* case as did the Indiana court. However, that court, at page 520 of the Northeastern Report, states the universally recognized law that "if the beneficiary or assignee be a creditor, and holds the policy as a security merely, he will be a trustee for the excess, as is any other creditor who holds securities for a debt."

Fehr v. *Cawthon*, 293 Fed. 152, is also cited in the opinion (R. 122). Fully recognizing the proposition that if the transaction was a pledge and not a sale the named beneficiary was entitled to receive only such part of the proceeds from the policy as would pay the indebtedness, the court concludes at page 154 that there had been a sale of the policy because: "The

proposal to 'wipe the slate clean' could mean nothing except to pay the debt."

In the opinion (R. 120) it is said that petitioner's contention "must rest upon the premise" that merely because the named beneficiary had loaned money to the insured his status must be that of a pledgee. Although there is respectable authority supporting that proposition, the great weight of authority and the decisions of the Federal courts are against it. Petitioner does not make and has never made any such contention.

No criticism is made of the statement in said opinion that evidence of a parol trust must be clear and convincing. Even assuming the applicability of that yardstick to the transaction here involved, petitioner contends that its requirements were fully met; also that it was the province of the jury and not of the appellate court to weigh the evidence introduced and pass on its sufficiency.

Judgment Was in Effect a "Consent" Judgment

So far as petitioner and respondent are concerned, the judgment on said second appeal was in effect a "consent" judgment. In nullifying it, the judgment here sought to be reviewed is in conflict with the decisions of this Court and of other Circuit Courts of Appeals on the same matter, among which are the following:

United States v. *Babbitt*, 104 U. S. 767, at 768;
Nashville, Chattanooga & St. Louis Ry. Co. v. *United States*, 113 U. S. 261, at 266; 5 S. Ct. 460;
McGowan v. *Parish*, 237 U. S. 285, at 295 et seq.; 35 S. Ct. 543;
Bullard v. *Commissioner of Internal Revenue*, 90 Fed. (2d) 144 (7th C. C. A.), at 147;
United States v. *Berman*, 88 Fed. (2d) 645 (2nd C. C. A.).

In the *Berman* case, *supra*, defendant was charged with a felony. Even there the principle here invoked was applied, the court saying at page 646 that "the defendant many not complain of this part of the judgment, because he not only con-

sented to it, but actually asked for it." In the case at bar respondent obtained precisely the judgment he asked for on said second appeal.

Judgment on Second Appeal Was Res Judicata and Not Subject to Later Review

In its opinion (R. 117) the Circuit Court of Appeals disposes of petitioner's contentions with respect to the nature and effect of that court's judgment on said second appeal by saying that the judgment of the District Court was there "reversed solely on the question of the liability of the insurance company;" that the controversy between petitioner and respondent was "reserved" and not decided by the District Court on said second trial because the District Court denied recovery to both and entered judgment for defendant Society; and that "Lack of adjudication is further shown by the retrial of the case pursuant to remand, (108 F. 2d 902), and the judgment of the trial court, which is the basis of this appeal."

Petitioner contends that there can be no such thing in this or any suit to enforce claimed rights of the parties against each other, as an adjudication of a floating liability of a defendant to no one in particular. Said judgment on said second appeal was not a judgment that defendant Society was "liable" to some unidentified person or persons; it was a judgment expressly declaring and fixing liability of defendant Society to petitioner and respondent.

Obviously there was and could have been no controversy between petitioner and respondent on that appeal, having in mind the joint Points relied upon by each and the demand of each that judgment be there entered in favor of each. As between them the only possible question remaining unsettled was collection costs to which respondent might be entitled and which were later awarded to him by the District Court. Obviously the opinion (108 F 2d 902) could discuss only the matter of liability of defendant Society to petitioner and respondent.

Upon the record and under the pleadings to which attention has been called, petitioner was and is, *as a matter of law*, entitled to judgment for all of the proceeds from the policy, less the indebtedness and collection costs, or he was and is

entitled to nothing. *There was and is no possible middle ground.* The judgment in his favor on said second appeal necessarily denied any right in respondent to any part of said proceeds, except sufficient thereof to pay said indebtedness and collection costs. As a matter of law such has been the situation in this suit at all times since petitioner intervened.

That the District Court "reserved" questions that might be involved in a controversy between petitioner and respondent has no support in the record except said statement in the opinion (R. 117) that such reservation is evidenced by the District Court's denial of recovery to either of them and its entry of judgment for defendant Society. It is respectfully submitted that by said action the District Court "reserved" nothing. It was merely an adjudication that neither of said parties had a cause of action against defendant Society.

Said statement in the opinion that there was a "retrial of the case pursuant to remand" on said second appeal is incorrect unless various motions, filing of the ancillary petition, and the award of collection costs be deemed a "retrial." Aside from the stipulation relative to attorneys' fees and expenditures, no evidence was introduced.

Upon the filing of said mandate the District Court had no alternative other than to enter judgment in favor of petitioner and respondent and against defendant Society; it could award respondent only the amount loaned with interest, collection costs and costs of suit. Whether that court properly entertained said ancillary petition for collection costs is not material because petitioner felt that such award was just and has not complained of that action.

It is contended: that said adjudication on said second appeal finally determined petitioner's right to judgment against defendant Society and became *res judicata* on that question; that the decision and judgment here sought to be reviewed are in conflict with the decisions of this Court and of other Circuit Courts of Appeals on the same matter; and that in rendering said judgment said court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Among the decisions with which it is thus in conflict are the following:

Thompson v. *Maxwell Land Grant and Ry. Co.*, 168 U. S. 451, at page 456; 18 S. Ct. 121;
Lederer v. *Real Estate Title Ins & Trust Co.*, 273 Fed. 933 (3rd C. C. A.), at page 933;
Maryland Casualty Co. v. *City of South Norfolk*, 54 Fed. (2d) 1032 (4th C. C. A.), at page 1039.

In the case last above cited the court holds at page 1039 that any claim that its former decision was erroneous and should be reversed presents "a question which must be raised by petition for rehearing and not by subsequent appeal."

The cases next below cited are in point on this phase of the case and also hold that every question which may properly be raised in opposition to a decision on one appeal becomes *res judicata* between the parties on a later appeal.

Burns v. *Cooper*, 153 Fed. 148 (8th C. C. A.), at page 151;
Guaranty Trust Co. v. *International Steam Pump Co.* 242 Fed. 920 (2nd C. C. A.), at page 921;
Western Union Telegraph Co. v. *Czizek*, 286 Fed. 478 (9th C. C. A.), at page 481;
Raydure v. *Lindley* et al., 268 Fed. 338 (6th C. C. A.);
Sun Co. v. *Vinton Petroleum Co.*, 248 Fed. 623 (5th C. C. A.), at page 625.

In the case last above cited the court says at page 625 that "a subsequent appeal brings up nothing but the proceedings subsequent to the mandate" and that to allow a second appeal on "questions which were open to dispute on the first would lead to endless litigation."

The only evidence added to the record since said second appeal is said stipulation relative to respondent's collection costs. If the judgment on said second appeal was right, it necessarily follows that the judgment here sought to be reviewed is wrong. If respondent was right on said second appeal when he insisted that petitioner had a cause of action and was entitled to judgment, he is manifestly wrong when, on the identical record, he now insists that petitioner has no cause of action and is entitled to nothing.

If the judgment on said second appeal was not a final adjudication that petitioner is entitled to judgment against defendant Society, it would seem that the judgment here sought to be reviewed, which purports to adjudicate that petitioner is entitled to nothing, is likewise not a final judgment and may properly be reviewed and reversed at any future time.

It is submitted that each of the questions herein presented is of importance and that a writ of certiorari should issue as herein prayed.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and proceedings of said Circuit Court of Appeals had in said cause, which is numbered as No. 2206 on its docket, wherein "George Zolintakis, executor of the will of Peter Zolintakis, deceased, and substituted herein in lieu of said Peter Zolintakis" is designated as appellant and "Christ Orfanos as administrator of the estate of James Orfanos, deceased," is designated as appellee, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that said judgment of said United States Circuit Court of Appeals for the Tenth Circuit entered in said cause and herein sought to be reviewed may be reversed and that your petitioner may have such other and further relief as to this Court may seem just and proper.

Dated this 16th day of May, 1941.

CHRIST ORFANOS, as Administrator of the Estate of James Orfanos, Deceased,
Petitioner.

P. T. FARNSWORTH, JR.,
W. Q. VAN COTT,
Counsel for Petitioner.

E. C. JENSEN,
Of Counsel.

No supporting brief will be filed at this time.

IN THE SUPREME COURT OF THE [redacted]

OCTOBER TERM, 1940

CHRIST ORFANOS, as Administrator of the Estate of James Orfanos, Deceased,
PETITIONER AND APPELLEE BELOW,

vs.

GEORGE ZOLINTAKIS, Executor of the Will of Peter Zolintakis, deceased, and substituted herein in lieu of said Peter Zolintakis,
RESPONDENT AND APPELLANT BELOW.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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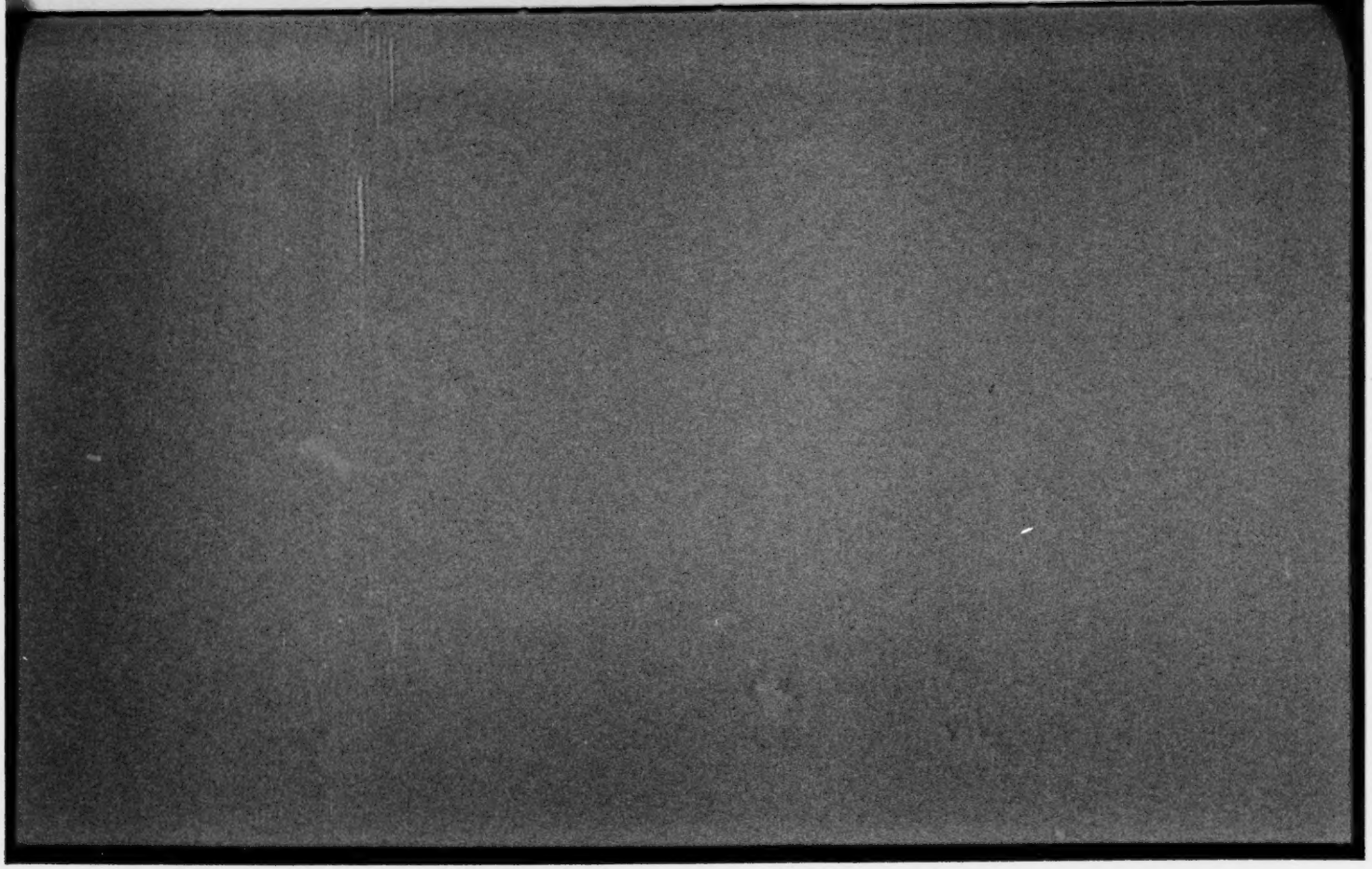

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1940

CHRIST ORFANOS, as Administrator of the Estate of James Orfanos, Deceased,
Petitioner and Appellee Below,

vs.

GEORGE ZOLINTAKIS, Executor of the Will of Peter Zolintakis, deceased, and substituted herein in lieu of said Peter Zolintakis,
Respondent and Appellant Below.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT AND BRIEF

The Revised Rules of the Supreme Court adopted February 13, 1939, Rule 38 (5) recites:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered."

The petition here does not appear to set forth any of the reasons following this statement and as contained in "(b)", the section relating to Circuit Court of Appeals decisions.

It is so obviously outside of the first four of these that they can be passed without quoting, as can also the matters at the top of page 11 of the petition. There is, possibly, a vague attempt to come under the fifth reason which is where the Circuit Court of Appeals:

> "* * * has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

A reference to the four "questions presented" at page eleven of the petition here will clearly show that the above would be the only reason that could be contemplated. These four questions will be hereinafter considered. The petition contains a statement which does not appear to be pertinent to the questions presented but is a discussion of the petitioner's view of his evidence and contentions. It is somewhat one sided, in that it assumes as facts, matters that were in dispute, and omits matters favorable to respondent's case.

The opinion of the Circuit Court sets forth a clear statement of the case, and one which with care presents the position of petitioner on the issues involved, entirely favorable to petitioner. We will not burden the court with a full statement of the case in view of the very clear statement contained in the opinion. We shall attempt to show that there has been no flagrant, or any, departure from the "accepted and usual course of judicial proceedings", and that petitioner's contentions were given careful consideration by the Circuit Court of Appeals.

QUESTIONS THREE AND FOUR

In considering the four questions presented (Pet. 11), we will consider them in the order in which they were decided in the opinion of the Circuit Court of Appeals, and therefore in the reverse order presented by petitioner.

In questions Nos. 3 and 4, the petitioner contends that the judgment on the second appeal was in effect a "consent judgment" as between the parties here, and that this issue was decided by the Circuit Court of Appeals in the second appeal of this case, or that it should have been then presented and adjudicated. This question is disposed of in the first portion of the opinion of the Circuit Court.

What is termed the second trial and second appeal were second trials and appeals as against the insurance company on the insurance policy. The contract of the insurance company was to pay to the beneficiary, and the suit was therefore brought by the beneficiary against the insurance company. The intervenor had no case against the insurance company and attempted to make none. (R. 27) As recited in the opinion herein sought to be reviewed, the petitioner, as intervenor,

> "asked the court to declare the appellant trustee for the use and benefit of the estate of said insured of any amount recovered by the appellant from the insurance company in excess of the debt of insured to beneficiary appellant."

On the second trial, as well as the first trial, the district court decided in favor of the insurance company. After the second decision the petitioner, as intervenor, joined with the beneficiary as appellants to reverse this judgment in favor of the insurance company.

In the second trial of the main issue against the insurance company, the trial court received evidence on this side issue, between the parties now before the court, as to which should get the policy proceeds, if any, were recovered. The trial court did not decide this side issue, but did decide that there was no valid claim against the insurance company, and therefore no fund to be litigated as between the Respondent, beneficiary, and the Petitioner, as intervenor.

As the opinion of the Circuit Court on the third appeal and, now objected to, recites:

> "The trial court 'reserved' the question and did not decide the issue which now constitutes the subject matter of this suit."

Twice in the petition, the petitioner states that this statement by the Circuit Court is not supported by the record now presented to this court.

We make a point of objection here, that this Court should not be called upon to decide that question without having before it the record on the second appeal. The court of appeals had that record before it when it made the decision on this third appeal; and, having also considered that record, on the second appeal, knew exactly what was involved. On

this third appeal both sides quoted from that record in their briefs. That record is not before this Court.

In addition, it does appear by the record here that the trial court twice indicated to petitioner's counsel that the issue here involved had been reserved by the trial court on the second trial. (R. 68)

It is clear that the trial court did not decide this issue on the second trial. The record here clearly indicates that on the second appeal, this petitioner represented to the Circuit Court of Appeals that this issue had not been decided, and that no issue as between the parties here was presented on the second appeal. In the statement of points relied upon on the second appeal, intervenor joined and said to the Circuit Court:

> "This appeal involves no matter as between appellants. Such matters were not decided by the Court. Intervenor relied upon the record as made by plaintiff and the judgment of the Court dismissing the complaints of both is hereby appealed from by both and this designation of points relied upon is made and relied upon by both said appellants." (R. 135)

On the second trial neither the main issue against the Insurance Company nor this side issue, were submitted to the jury for verdict. The Court simply submitted certain interrogatories to the jury. Most of these were on the issue as against the insurance company. A few related to this side issue. In the brief by both parties here to the Circuit Court of Appeals on second appeal against the insurance company, it was stated:

> "The interests of the intervenor and the plaintiff in this proceeding are identical. No issue as between them is involved. The complaints of both were dismissed." (R. 17)

And also:

> "With this background, we now quote the interrogatories and answers not hereinbefore quoted. (Interrogatories 12 to 16 inclusive, are omitted entirely because they pertain to an issue between appellants only, and which is not here presented)." (R. 17)

Petitioner's contention as to "consent judgment" (Pet. 16) seems to make vague reference to the answers of the jury to interrogatories 12 to 16 and also appears to intimate that the mandate from the Circuit Court on second appeal required an entry of judgment for it. It is difficult indeed to see any basis for the contention that respondent beneficiary ever consented to judgment in favor of petitioner.

The pleadings and contentions throughout on this issue were consistently against any such position.

As stated above, the jury entered no verdict for or against either party on this issue. The trial court said to the jury:

> "This case, gentlemen, will not be submitted to you to find a general verdict for or against the Insurance Company. It is being submitted to you upon what is called special interrogatories, and you will be required, under all of the evidence in the case and the instructions now given to you, to record your answer to each one of these interrogatories.
>
> "There are certain questions in this list propounded to you relating to the claim of the intervenor." (R. 59)

The trial court stated on the third hearing, which was on this side issue, that the case had not been submitted to the jury nor had the jury been asked as to the main issue involved. (R. 65)

Under Rule 49 "Rules of Civil Procedure", the answers of the jury to these interrogatories on this issue did not constitute a verdict or a decision of the matter. The court was still required to make Findings. And under Rule 58, the court is then required to: "Deliver the appropriate judgment to be entered."

The court on the second trial made no Findings on this issue and directed no judgment.

Under Rule 54 when more than one claim for relief is presented in an action, the court, at any stage, may make separate determinations of the separate issues presented.

Findings and Judgment were made and entered by the court on the third hearing and appealed from. This, for the first time, presented any phase of this issue to the Circuit Court. In the Circuit Court on the third appeal and now, by petition, it is contended that when the Circuit Court reversed

on second appeal and directed judgment to be entered against the insurance company, that the trial court was required to enter judgment in favor of petitioner, as intervenor, for the full amount of the fund, even though that issue had then never been decided by the trial court, never appealed and never presented to or considered by the Circuit Court. Appellant refers to the language of the mandate, (R. 13) that judgment be entered in favor of both appellants. This clearly did not preclude judgment as their interests entitled them. The important point was the reversal as against the defendant insurance company. This was what both the parties here had asked, and this only. The mandate also directed that:

> "Such further proceedings be had in said cause, in conformity with the opinion and judgment of this court as according to right and justice, and the laws of the United States, ought to be had." (R. 14)

The trial court then stated that he was proceeding pursuant to this language of the mandate. (R. 69) Petitioner also overlooks the fact that in concluding its opinion and judgment reversing the case as against the insurance company on second appeal, the Circuit Court said:

> "The answers to the special interrogatories required that judgment be entered for *plaintiff*. The judgment of the trial court is reversed and the complaint is remanded, with direction to enter judgment for plaintiffs." (108 F. (2d) 902 at 906).

Respondent here was the plaintiff there, and if there was then any indication from the Circuit Court that judgment should go for either party here, to the exclusion of the other, it was that judgment should be entered for plaintiffs and not for the intervenor. Of course we could not in good faith so contend because we too had told the Circuit Court that this issue had never been decided and was not before that Court on the second appeal.

The rule as we understand it is that an appeal from a judgment of the trial Court presents for adjudication by the appellate Court only the questions involved in the judgment appealed from.

> *Chase v. United States*, 261 F. 833 (8 C. C. A.) citing *Mutual Life Insurance Company v. Hill*, 193 U. S. 533, 48 L. Ed. 788;

United States v. River Rouge Imp. Co.,
296 U. S. 411, 70 L. Ed. 339.

Further, that an appeal will lie only from the final judgment of the trial Court on the issues decided, and will not lie, nor will an appellate Court consider issues not decided by the trial Court.

C. T. C. Inv. Co. v. United States,
108 F. (2d) 383;

Kemp v. National Bank of the Republic,
109 F. 48 (C. C. A. 4);

Certain-Teed Products Corporation v. Wallinger, 89 F. (2d) 427 (C. C. A. 4).

We find no difficulty with the cases cited by petitioner (pp. 16, 19) to the effect that the decision on former appeal of the matters raised is usually binding and becomes the law of the case, or that we are bound by questions which were determined on the former appeal, or that we were then bound to raise any questions decided by the trial Court, and which were involved in the judgment in favor of the insurance company, then appealed from. We simply cannot see that these cases have any application here.

It does not appear as to petitioner's questions 3 and 4 that the Circuit Court departed in any degree, "from the accepted and usual course of judicial proceedings."

SECOND QUESTION PRESENTED.

The second question presented by petitioner is, "was there sufficient evidence to sustain said Findings of Fact and Judgment?" The discussion of this (p. 13) adverts to the jury Findings as if there were a verdict entered. As a matter of fact, certain questions only were asked, some of which the jury answered favorably to the petitioner and some favorably to the respondent. (R. 59) Some of the answers were clearly not supported by the evidence, but are contrary thereto. There was no evidence whatsoever to the effect that the insured ever promised to pay back to the beneficiary any money advanced by the latter. There was no evidence of any statement that the policy should be returned if the money was paid back or that the money must be paid back.

In any event all that the jury found favorable to petitioner, is their answers to the effect that the advancement of money by the beneficiary to the insured was as a loan.

The opinion of the Circuit Court of Appeals reviews the pertinent testimony and then states that it will assume, for the purposes of its decision, that there was a loan of the money and a debtor and creditor relationship created; so that the Circuit Court instead of setting aside, as claimed, the Finding of the jury, assumed such Findings to be correct and then held at a matter of law that this did not determine the case in favor of the petitioner. The opinion says:

> "We will assume without more, for the purpose of our decision, that a debtor and creditor relationship existed between insured and beneficiary."

The Court then squarely faced the proposition as to whether or not a debtor-creditor relationship between insured and beneficiary was sufficient in and of itself to establish a trust of the proceeds of the insurance policy without more:

> "In our view, the result does not turn on the question of whether or not there was a loan by the appellant beneficiary to the insured, in consideration for which the appellant was made beneficiary, but rather does the existence of the debtor-creditor relationship, created by the loan, limit the otherwise unqualified and vested right of the beneficiary to the proceeds of the policy upon maturity of the contract." (R. 119)

It then holds, upon the authorities cited in the decision, and the other authorities cited by petitioner, and in view of the Utah decisions as to the rights of beneficiary, and the language of this policy agreement, that such findings by the jury or by the Court were not determinative of the issue, but that the beneficiary was nevertheless entitled to recover.

The holding of the Court "that absent a clear, convincing and cogent expression on the part of insured to the contrary, the designated beneficiary in a policy of insurance is entitled to the entire proceeds on maturity of the contract," and "that a debtor-creditor relationship created by a loan of money from the beneficiary to the insured creates no presumption of a limited right of recovery on the party of the designated beneficiary", indicates that the findings

of the jury and the evidence in the record in support thereof were received and reviewed by the Circuit Court of Appeals in a light most favorable to petitioner, and that the findings of the Court were not disregarded, whether supported or unsupported.

There was no departure from "the accepted and usual course of the judicial proceedings." The holding of the Court on the issue as to the existence of a trust above stated, is supported by the overwhelming weight of authority, as is indicated in the opinion itself. Petitioner does not appear to take exception to the law as laid down by the Circuit Court of Appeals on this question. We respectfully suggest that the writ is sought merely to review the evidence or the inferences drawn from it, and therefore should be denied.

> *General Talking Picture Corporation v. Western Electric Company*, 304 U. S. 175, 82 L. Ed. 1273, 58 S. Ct. 849.

FIRST QUESTION PRESENTED.

The first question presented by petitioner (p. 11) challenges the power of the Circuit Court of Appeals in reversing this case to direct judgment for the respondent without granting a new trial.

The first point discussed under this is the contention that the case was tried to a jury, and therefore petitioner should have been granted a new trial on reversal of the judgment. As herein pointed out the Circuit Court gave full force and effect to the jury's answers and also the findings of the Court that a debtor-creditor relationship existed between the insured and the beneficiary. The statement as to the trial is not accurate for the reason that this issue came up directly on the third trial and while no additional evidence could be adduced, there was of course opportunity to try the matter fully.

It was heard exclusively by the Court, both sides participating and the Court then entered its decision (R. 66) in which it was said:

> "I think that under that state of facts the law would raise the question of trusteeship."

While the trial Court indicated that it accepted the answers of the jury, the Court nevertheless made complete findings, conclusions of law and judgment after the third hearing. These were prepared by petitioner. They did not incorporate any formal approval of the answers by the jury.

The next point discussed by petitioner (R. 12) is that the respondent did not move to vacate any of the answers by the jury within ten days. It is claimed that this was required by subdivision (b) of Rule 50. That rule, however, relates only to a "verdict" by the jury and here there was no verdict. The next contention is that even though there was no motion to vacate by respondent that the Court was without power to direct a judgment, but no authority is cited supporting this contention. The finding of the Court of a trusteeship relationship was pursuant to petitioner's complaint in intervention (R. 5) in which it was specifically alleged that the beneficiary,

> "was and is a trustee for the use and benefit of this intervenor of the proceeds of said policy * * *" (R. 6)

And wherein it was specifically prayed:

> "That the Court declare that the plaintiff, Peter Zolintakis is trustee for the use and benefit of the estate of the said deceased of any amount recovered by said plaintiff from the defendant * * *."

As already pointed out, the case proceeded entirely upon the theory that the claim against the insurance company was one by the beneficiary, and that the side issue as to the right to the fund was an equitable matter to be decided and which was decided by the trial Court, the petitioner fully concurring.

The purpose of petitioner's action being to establish the existence of a trust was purely equitable.

See,

Pomeroy Equity Jurisprudence, Fourth Edition, Volume 1, Section 151, page 184 and Section 155, page 189;

Clews v. Jamieson, 182 U. S. 461, 45 L. Ed. 1183:

National Bank of Commerce v. New York Equitable Trust Company, 227 Fed. 526;

Delaware Bay State Gas Company v. Rogers, 147 Fed. 557;

Hopkins v. Grimshaw, 165 U. S. 342, 41 L. Ed. 739;

Thompson v. Emmett Irrigation District, 227 Fed. 560.

An appeal in equity brings up the whole record, and the appellate Court is authorized to review the evidence and make such order or decree as the Court in the first instance ought to have made, giving proper weight to the findings on disputed issues of fact, which should be accorded to a tribunal which heard the witnesses.

Keller v. Potomac Electric Power Co., 43 S. Ct. 445, 261 U. S. 428, 67 L. Ed. 731;

Metropolitan Holding Co. v. Snyder, 79 Fed. (2d) 263, 103 A. L. R. 912;

Waters v. Disbrow & Co., 70 Fed. (2d) 572;

A. O. Smith Corporation v. Petroleum Iron Works Co. of Ohio, 73 Fed. (2d) 531;

Swift v. Jackson, 37 Fed. (2d) 237, certiorari denied 50 S. Ct. 351, 281 U. S. 745, 74 L. Ed. 1158;

Jonah v. Armstrong, 52 Fed. (2d) 343;

Radio Corporation of America, et al., v. Radio Engineering Laboratories Inc., 293 U. S. 1, 79 L. Ed. 163;

Howbert v. Penrose, (10 C. C. A.) 38 Fed. (2d) 577;

Maryland Casualty Co. v. Beebe, (10 C. C. A.) 54 Fed. (2d) 743;

Stanley v. Stanley, 97 Utah 520, 94 Pac. (2d) 465;

Silver King Consol. Mining Company v. Sutton, 85 Utah 297, 39 Pac. (2d) 682;

Jensen v. Howell, 75 Utah 64, 282 Pac. 1034;

Tripp v. Bagley, et al.,
74 Utah 57, 276 Pac. 912.

All transactions with relation to this policy were between the insured who is dead and the beneficiary who is dead. Neither can give further testimony and no one else was present at the time of the transactions.

One witness, George Cayias, who testified on the first two trials against the insurance company had only to do with the issuance of the policy and testified as to the difficulty the insured had in paying the premiums. This testimony was presented by the insurance company and preserved in this record. (R. 28) It had no bearing upon any issue decided.

No reliance was placed on any rulings of the court as to the admission or exclusion of evidence. There was no suggestion that any new or different evidence could be developed on subsequent trial; it is apparent that it could not be. No contention is made that any additional evidence could be presented.

It is also true as stated in the petition (p. 18) "no evidence was introduced" upon the third trial, when this matter came before the court for final determination. Neither party then had any additional evidence.

Under such circumstances it was the duty of the Circuit Court to determine the issues without remand.

City and County of Denver v. Denver Union Water Company, 38 S. Ct. 278, 246 U. S. 177, 62 L. Ed. 649;

Allen v. St. Louis National Bank, 120 U. S. 20, 30 L. Ed. 573;

Arizona Edison Company v. Southern Sierra Power Company, 17 Fed. (2d) 739, certiorari denied *Southern Sierra Power Company v. Arizona Edison Company,* 47 S. Ct. 768, 274 U. S. 757, 71 L. Ed. 1336;

Weeks v. Pratt, 47 Fed. (2d) 53, certiorari denied *Pratt v. Weeks,* 51 S. Ct. 106, 282 U. S. 892, 75 L. Ed. 756.

In the case of *Alwood v. Lewis,* 254 Fed. 810, 166 C. C. A. 256, it was held that:

> "Where the facts in an equity case were fully developed and the trial Court disregarded the advisory verdict of the jury, and where the litigation had been long drawn out, the appellate Court was warranted in determining the issues of fact."

On the second appeal of this case the Circuit Court reversed the judgment of the trial Court and remanded the cause with direction to enter judgment against the defendant Insurance Company without new trial. 108 Fed. (2d) 902. Certiorari denied, 310 U. S. 640; 60 S. Ct. 1087.

In *Swift v. Jackson*, (10 C. C. A.) 37 Fed. (2d) 237, the Tenth Circuit Court of Appeals held that in an appeal in equity the appellate Court has full power to make and enter its own decree.

CONCLUSION.

It would appear, therefore that there has been no departure "from the accepted and usual course of judicial proceedings," either indulged in or sanctioned by the Circuit Court of Appeals. That there is no special and important reason, or any reason, for the granting of certiorari in this case.

It is respectfully submitted that the petition should be denied.

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